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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-763

PERRY BRADSHAW,
WARREN D. TUCKER,
and
BERNARD C. KELLY,

versus

MELVIN LAIRD,
Secretary of Defense,
WILLIAM CHAFFEE,
Secretary of the Navy,
ROBERT E. HAMPTON,
Commissioner, Civil Service Commission,
JAMES B. JOHNSON,
Commissioner, Civil Service Commission,
NICKOLAS J. OGANOVIC,
Commissioner, Civil Service Commission.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered in these proceedings on September 13, 1971.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit affirming a judgment entered in favor of the respondents in the United States District Court for the Eastern District of Virginia, at Norfolk, is embodied in a per curiam opinion which has not yet been reported. The opinion appears in the Appendix, *infra,* along with the written opinion entered by the District Court which is reported at 319 F. Supp. 390 (1970).

JURISDICTION

The judgment of the United States Court of Appeals was entered on September 13, 1971. The time for filing the petition will expire on December 12, 1971.

QUESTION PRESENTED

Whether respondents have acted arbitrarily and beyond the scope of their authority under the provisions of 5 U.S.C. §5341, effective September 6, 1966, and 10 U.S.C. §7474, prior to that date, in the establishing for the petitioners of wage rates substantially lower than received by employees with comparable jobs and skills who work in private industry in the geographical area of petitioners' employment and substantially lower than deemed warranted by the respondents' own wage audits for petitioners' employment as blue-collar Aircraft Examiners at the Naval Rework Facility, Norfolk, Virginia.

STATUTES INVOLVED

Title 5, United States Code Section 5341 in relevant part:

> "(a) The pay of employees excepted from chapter 51 of this title by section 5102(c)(7) of this

title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. Subject to section 213(f) of title 29, the rates may not be less than the appropriate rates provided for by section 206(a)(1) of title 29."

Title 10, United States Code Section 7474 (repealed by 5 U.S.C. §5341):

"The Secretary of the Navy shall establish rates of wages for employees of each naval activity where the rates are not established by other provisions of law to conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity."

STATEMENT OF THE CASE

A. Proceedings

The petitioners are blue collar Aircraft Examiners, members of the National Association of Aeronautical Examiners, and are employed at the Naval Air Rework Facility, Norfolk, Virginia, and at other locations throughout the United States. The respondents, Melvin Laird, Secretary of Defense, William Chaffee, Secretary of the Navy, Robert E. Hampton, Commissioner, Civil Service Commission, James B. Johnson, Commissioner, Civil Service Commission, and Nickolas J. Oganovic, Commissioner, Civil Service Commission, are all charged with the responsibility of implementing rules and regulations for the setting of civilian employees' wages at naval facilities, including the members of petitioners' class pursuant to 5 U.S.C.A. §§5341(a) and 5343. Prior to Septemer 6, 1966, the controlling statute was 10 U.S.C.A. §7474.

Petitioners brought this class action on their own behalf and on behalf of all other Aircraft Examiners employed by the United States Department of Defense at various naval installations throughout the United States, to challenge the method by which their wages were established. The petitioners' wages are required by law to conform as nearly as is consistent with the public interest, with wages paid in private industries in the immediate vicinity, and their wages must be periodically adjusted to assure that they so conform. The Department of Navy in an effort to comply with the law, initiates wage surveys in the vicinity of the Naval Air Rework Facility at Norfolk, Virginia. These surveys are made pursuant to regulation and procedures formulated by the Department of the Navy for this purpose.

Petitioners contended in the District Court that since 1963 each of the surveys taken by the Navy was improper in that they did not review or compile the wages of persons doing substantially the same work as petitioners do, nor did the Navy survey industries similar to that of the Naval Air Rework Facility. Further, petitioners contended that the Navy's regulations established an arbitrary percentage rate higher than the wage of the tradesmen they supervise.

Since 1967 all audits or examinations of the position of Aircraft Examiner made by and on behalf of the respondents have established that petitioners' duties and responsibilities require and justify higher wages. Petitioners contended that the respondents arbitrarily, without regard to the statutory mandate, refused to increase Aircraft Examiners' percentage differential when all relevant data available to them warranted an increase.

After a trial on July 6, 1970, at which time evidence was taken, the District Court in an Opinion en-

tered on November 19, 1970, dismissed plaintiffs' action. The District Court's Opinion appears in the Appendix, *infra.*

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court in an opinion entered on September 13, 1971. Appendix, *infra.*

B. Facts

Plaintiffs are a class of Aircraft Examiners who are employed by the United States at seven Naval Air Rework Facilities throughout the United States. Aircraft Examiners are responsible for the physical running of the aircraft to determine if any malfunctions exist in the various components and systems, in order to decide the depth of rework necessary during periodic overhauls performed by the Navy on its aircraft. Tr. 29.

The wages of Navy Aircraft Examiners are established by the use of a percentage differential over the amount paid to a mechanic in the trade which they examine. Tr. 133. The percentage differential at the time of this suit was 19.2 per cent. This was put into effect in 1969. Tr. 37. From 1963 to 1969, the percentage differential was 16 per cent. Tr. 36.

In 1963, the commanding officer of the Naval Air Station at Norfolk, S. M. Mullholand, wrote to the Chief of the Bureau of Naval Weapons recommending that the Examiners' pay differential be raised to 25 per cent because of their responsibilities and because their current pay was inadequate. Plaintiff's Exhibit 2. The National Association of Aeronautical Examiners sought to have their pay differential raised numerous times. An audit was granted at their request and performed by the

Office of Civilian Manpower in Washington in 1967, Tr. 41, but the rate was not raised.

In 1967, Mr. Edward Webb, of the Navy Department, performed an on-site audit of the Aircraft Examiner position at the Naval Air Rework Facility at Norfolk. Tr. 68. During the course of the audit he was given a "thorough briefing of the kinds of duties and responsibilities they were assigned," by the Aircraft Examiners themselves. Tr. 69. Although the ultimate decision was against implementing an increase in the differential for Examiners, the reason was not because an increase was unwarranted. In fact, the "Memorandum to File," Plaintiffs' Exhibit 3, listing the findings of the on-site audit, gives every indication that the job responsibilities and "the independence with which these employees [Aircraft Examiners] operate" were such as to warrant a pay increase. In addition, some of the previous functions of Planners and Estimators had been assumed by Examiners. Plaintiffs' Exhibit 3, p. 2.

Further, during the time period in question, Planners and Estimators had received pay increases relative to Examiners, and it is in the record that, although the details of their work differed, Planners and Estimators were "in a sense—doing the same type of work." Tr. 96. Captain Farnsworth, as Commanding Officer of the Naval Air Rework Facility at Norfolk in a letter dated June 9, 1969, to the Naval Air Systems Command, Washington, D. C., Plaintiffs' Exhibit 11, strongly recommended that the differential of Examiners be increased prior to the implementation of the Coordinated Federal Wage System. Captain Farnsworth in paragraph 4 of his letter as an additional reason why the Examiners' differential should be increased said:

> "4. The problem is further aggravated by the proposed interim adjustment as per OCMM-

NOTE 12531 OCMM o333.1:sjs of 4 April 1969 which will result in further misalignment between Aircraft Examiners and the closely related positions of Planner and Estimators."

This recommendation was not implemented. Tr. 96.

Captain Farnsworth's letter is supported by substantial basis in fact. Mrs. Vida Meacham, a position classifier at the Naval Air Rework Facility, testified that her duties involved studying job responsibilities at the Naval Air Rework Facility in order to arrive at suitable pay levels applying evaluation criteria issued by higher level authorities. Tr. 108. She prepared Plaintiffs' Exhibit 7, which is a "Recapitulation of Certain Data Relative to Aircraft Examiners." In addition, she performed an audit with members of the Aircraft Examiners' national association, Tr. 111, and prepared an analysis of the job. She recommended that a pay increase be given due to the "sophistication of aircraft, increased complexity of weapons systems," Tr. 113. Plaintiffs' Exhibit 7 at page 3 indicates the opinion she expressed in writing for use of the Executive Officer of the Naval Air Rework Facility. Mrs. Meacham's testimony indicates that the commanding officer was well aware of the complexity and responsibility involved in the Aircraft Examiners' work when he made his June 9, 1969, recommendation for an increased differential for Aircraft Examiners.

Mr. William N. Price, Director of the Manpower Planning Division of the Office of Civilian Manpower Management, Department of the Navy, testified that he directed the audit in 1967 to establish whether or not the Aircraft Examiners should receive an increase. Tr. 117-118. After evaluating their findings, Mr. Price came

to a tentative decision that the Aircraft Examiners should receive an increase, however, after conferring with the Civil Service Commission this decision was modified and no increase was recommended. Tr. 125. The reason was that the Coordinated Federal Wage System established by Executive Order in 1968 was scheduled to go into effect in a few months which would mean that all ungraded pay would be set by a single system under the control of the Civil Service Commission. But the Coordinated Wage System did not at that time apply to Aircraft Examiners.

Mr. Gordon Kellet, a personnel management specialist employed by the Civil Service Commission, testified that he told Mr. Price that the Civil Service Commission would object to the proposed change in the pay differential for Aircraft Examiners because they did not want to change anything until the new Coordinated Wage System went into effect. Tr. 198. The Civil Service Commission made no audit. It merely did not want to disturb the status quo. Tr. 199. The Aircraft Examiners were put in a special "set aside" category pending further study, but no increase was implemented, other than an across the board interim increase for all of the supervisory employees in the "set aside" category. Tr. 143, 196, 200. This resulted in further disparity between Planners and Estimators' wages on the one hand and Aircraft Examiners' wages on the other.

REASONS FOR GRANTING THE WRIT

The decision below upholds a method of establishing wages of government employed Aircraft Examiners which petitioners contend conflicts with the legislative intent of Congress and with the express language of the statute requiring wages of civilian employees to be established as nearly comparable as is consistent with public

policy with prevailing wages in the area where the employees work.

Petitioners, on behalf of a large class of government employees, challenge as arbitrary and illegal the use of the percentage differential method of setting Aircraft Examiners' wages geared to the wages of the supervised mechanics without a direct relationship to wages received by persons with comparable jobs and skills who work in private industry in the relevant wage areas, or without an independent basis for determining a fair and competitive wage.

I. Statutory Guidelines and Policy Considerations

Petitioners below challenged both the failure of the Navy to grant wages when its own wage audits indicated increases were warranted as well as the method the Navy chose to determine wages of Aircraft Examiners, the percentage differential. The authority to establish petitioners' wages is found in 5 U.S.C. §5341, effective since September, 1966, which provides that wages are to be set "as nearly as is consistent with the public interest in accordance with prevailing rates." The predecessor statute, 10 U.S.C. 7474, had the same requirement.

In establishing wages for supervisory level employees the Navy conducts wage surveys of private jobs comparable to the government employees who are supervised but no surveys of privately employed supervisory employees. The government supervisory level employees have their wages determined by a percentage differential above the rate of the mechanic they supervise. This is the method the respondents applied in determining the wages of Aircraft Examiners.

The Navy's pay scales, in addition to being expressly regulated by §5341, are governed by a clear statement of

the underlying congressional intent which should be considered in construing the statutes and in determining whether respondents have violated their duty under the law. This is set forth in 5 U.S.C. §5301 as follows:

> "It is the policy of Congress that Federal pay fixing be based on the principles that—
>
> (1) There be equal pay for substantially equal work, and *pay distinctions be maintained in keeping with work and performance distinctions;* and
>
> (2) Federal pay rates be *comparable with private enterprise pay rates for the same levels of work.*" (Emphasis supplied)

This legislation is consistent with prior legislation establishing a federal policy of maintaining competitive salaries. The Supreme Court in *Amell* v. *United States*, 384 U.S. 158, 161, n.7 (1966), a case involving the jurisdiction of the Court of Claims to hear actions for wages brought by certain government employees, recognized the trend in government employment to pay salaries comparable to private industry:

> "In 1962, Congress enacted the Federal Salary Reform Act, making an explicit declaration of policy that federal salary fixing should be comparable to private enterprise salary rates for the same levels of work, Act of October 11, 1962, Pub L 87-793, 76 Stat 814, 5 U.S.C. §§1171-1174 (1964 ed.). Pursuant to congressional direction the President issued an Executive Order, Exec. Order No. 11173, Aug. 20, 1964, 29 Fed. Reg. 11999, taking full cognizance of the congressional p licy enunciated in the Federal Salary Reform Act of 1962 . . . Thus, the whole trend in government compensation is to draw individuals into public service by

providing salaries at least comparable to those they would earn on entering private industry."

There can be no question that the congressional interest in providing for comparable wages was to enable the Federal Government to be competitive in the job markets surrounding relevant wage areas.

Although the government contended below that petitioners had no counterparts in private industry and that petitioners are not supervisory level employees, but production facilitating employees, the government utilized the same method of establishing their wages as used by supervisory level employees, the percentage differential. Petitioners desire to raise the issue of the arbitrariness of this method. Cf. *Rogers* v. *Laird,* 319 F. Supp. 1 (E.D. Va. 1970), affirmed 4th Cir. (May 19, 1971), in which a petition for writ of certiorari has been docketed in this Court. No. 71-242, 40 L.W. 3126 (filed August 17, 1971).

II. Conflict with Court of Claims and other Decisions of this Court.

The respondents, on the one hand, contended below that it was reasonable and proper to "set aside" consideration of Aircraft Examiners' wages until the Civil Service Commission could study those positions which were different from most others in the Federal pay system. On the other hand, the respondents attempted to justify the use of a percentage differential as a method of establishing wages of employees such as the Aircraft Examiners because of their inability to make direct comparisons with other jobs in the private sector of the economy and because the use of a percentage differential resulted in a fair and uniform wage. The two positions are untenable in this case because when plaintiffs sought an adjustment

in their differential and when all the indications and evidence warranted an increase, the Department of the Navy declined to make an increase on the grounds that the method of establishing wages of Aircraft Examiners was unique and the Civil Service Commission wanted to preserve the status quo until it could determine how to establish plaintiffs' wages as part of the Coordinated Federal Wage System.

Whether a position is unique should not affect a decision to pay wages that are warranted. The defendants have a statutory duty to adjust wages. They have a statutory duty to pay competitive salaries. Yet when their own findings indicated that a particular group of employees, the Aircraft Examiners, were inadequately compensated, the respondents declined to act.

Concededly, the burden is on petitioners to show that respondents acted in an arbitrary and illegal manner. *United States* v. *Shimer*, 367 U.S. 374, *Udall* v. *Tallman*, 380 U.S. 1, and *Daniels* v. *United States*, 407 F.2d 1345 (Ct. Cl. 1969). However, petitioners contend that the burden has been met because the respondents have not determined their wages according to law.

The principal case concerning government wage setting under statutory direction is *Daniels* v. *United States*, 407 F.2d 1345 (Ct. Cl. 1969). Although the District Court below relied heavily on *Daniels*, petitioners believe that the principles set forth in that case are inconsistent with the Court of Appeals' decision below. The *Daniels* case was an action brought by Navy employees alleging that the Navy had acted arbitrarily in fixing their salary rates as ships' pilots by applying a percentage differential of seventy percent to the base pay for a 40-hour week of a Class A Ships Master in the Military Sea Transportation Service rather than basing

their wages on the rates of pay of non-government pilots in the same area. There, the statutes in question governing the establishment of Navy pilots' pay the applicable statutes provided for pay comparable not with local wage rates, but with *"nationally prevailing rates* and practices in the maritime industry" [Emphasis supplied].

5 U.S.C. §5342.

In the *Daniels* case, the factual situation materially differed from the case at bar. There, the Navy had performed a detailed investigation of ship pilots' salaries in the private sector. That investigation yielded an authoritative report which was introduced into evidence. The Court of Claims placed heavy reliance on the recommendations in the Navy's report which concluded that a uniform national salary rate should be established for pilots. Further, in support of the Navy's determination to set the pilots' wages by a uniform percentage differential method the Court of Claims pointed out that in the report, *supra,* at 11347,

> "It was found that no adequate salary formula could be established upon a classification of the relative functions, experience, and qualifications of the pilots, since most pilots performed or were qualified to perform the same duties to a greater or less degree. *In addition, the report determined that Navy pilots had no exact counterparts in the maritime industry."* (Citations omitted; emphasis supplied)

The terms of the applicable statute require Aircraft Examiners' wages to be set competitively in each wage area. The Navy does not conduct wage surveys of private Aircraft Examiners, but sets their pay at a percentage rate over the men they examine. There is no necessary relationship between the pay of the mechanic and an

aircraft examiner, although the District Court found this to be reasonable. A similar question was raised in Daniels, where it was contended that the pilots' pay was arbitrary because it was geared to the pay of a Ship's Master. The Court of Claims said, at 407 F.2d 13:

> "Plaintiffs further contend, however, that the use of the pay of a Class A Ship's Master, MSTS, as a salary base for Navy pilots is arbitrary because of the noncomparability of the duties of masters and pilots. The report tacitly admits that the two jobs are not comparable, but further states that—in the absence of any comparable base—it was necessary to select some position within the marine industry upon which to found the salary rate. This conclusion was reached, however, only after a careful consideration and rejection of the various pilot salaries that could be used as a base (Project 30-36). The important point, moreover, is that the amounts paid to non-Navy pilots in accordance with prevailing industry rates were calculated without reference to the position of Ship's Master. *It was only after the pilots' salary range was determined in light of industry practice that the search for a base settled upon the master's position. It is therefore seen that the pay of Navy pilots was related directly to the salaries paid other pilots,* and the use of the master's position as a base was merely a matter of administrative and mathematical convenience." (Emphasis supplied).

Although there may be no exact counterpart to the Aircraft Examiners in the private sector of the economy, this does not relieve the respondents of an obligation to establish competitive and fair wages. The Court of Claims in the *Daniels* case was careful to point out that the pay

of Navy pilots as a result of applying a percentage differential was *directly related* to salaries paid other pilots, even though there was no exact counterpart.

The respondents, confronted by complaints from the National Association of Aeronautical Examiners that the petitioners' percentage differential was inadequate to compensate them for the type of work they were engaged in, did conduct an audit. The Navy Department, at every level from position classifier to commanding officer at the Naval Air Rework Facility to Director of the Manpower Planning Division of the Office of Civilian Manpower Management found that the wages of Aircraft Examiners were too low and that the percentage differential should be increased. However, the increase was denied, not because it was unwarranted, but because of the impending shift in responsibility over petitioners' wages from the Navy Department to the Civil Service Commission, the Civil Service Commission had requested that the Aircraft Examiners be put into a "set aside" category. Thus, while the evidence established that the percentage differential applicable to Aircraft Examiners was inadequate by the Navy's own standards, no increase was implemented.

Petitioners seek review by this Court in order to construe the statutes in question and in order to challenge the percentage differential method of establishing wages, generally, and the failure of the Navy to grant what petitioners contend was a warranted and statutorily compelled raise, specifically. The Navy still had authority over Aircraft Examiners' wages at the time it consulted with the Civil Service Commission and at that time, and for several years prior, the Navy could have, and petitioners contend should have, made an incerase in petitioners' percentage differential.

The Court of Claims in *Daniels, supra,* however, required that the percentage differential be directly related to the "prevailing rate" for private employees in the same field; that there be some independent basis for determining the salary level rather than arbitrary percentage differential over the lower level employees. The respondents failed to meet this requirement in the case at bar.

Respondents under the catch-all of the administrative discretion have declined to comply with the mandate of Congress to pay competitive and fair wages in keeping with prevailing rates. Under the statutes, they *must* pay prevailing rates. The statutory language is rendered meaningless by the respondents' actions unless they can show some compelling reason in the public interest why an adequate wage should not be paid. Mere administrative convenience is not so compelling as to justify setting aside the legitimate demands of government employees, particularly where the law is plain in its requirements. Petitioners wish to bring before this Court the issue of whether, in fact, there was an abuse of discretion of the respondents' decision to allow administrative convenience to prevent implementation of a wage increase compelled by law.

CONCLUSION

For the foregoing reasons, petition for a writ of certiorari should be granted.

Respectfully submitted,

PERRY BRADSHAW, et al.

By/s/STANLEY E. SACKS

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OPINION AND ORDER OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

PERRY BRADSHAW, WARREN D. TUCKER, and BERNARD C. KELLY,		
Plaintiffs,	)	Civil Action
v.	)	No.
MELVIN LAIRD, Secretary of Defense, et al,	)	399-69-N
Defendants.	)	

FILED NOV. 19, 1970

W. FARLEY POWERS, JR., Clerk

By s/ Jean I. Basnight
Deputy Clerk

OPINION AND ORDER

This is a class action on behalf of all members of the National Association of Aeronautical Examiners, employed at seven Naval Air Rework Facilities throughout the United States. Plaintiffs are civilian blue collar workers employed by the Department of the Navy as Aircraft Examiners at the Naval Air Rework facility in Norfolk, Virginia. This action challenges the defendants' implementation of the statute under which plaintiffs' wage rates are established. Plaintiffs contend that the defendants have failed to comply with the Congressional mandate expressed in 5 USC §5341, applicable since September, 1966, which provides:

> The pay of employees excepted from Chapter 51 of this Title by Section 5102 (c) (7) of this Title shall be fixed and adjusted from time to time as

nearly as is consistent with the public interests in accordance with prevailing rates

Before September 1966, 10 U.S.C. §7474 applied to the establishment of wage rates for civilian employees in the Department of the Navy.

> The Secretary of the Navy shall establish rates of wages for employees of each Naval activity where the rates are not established by other provisions of law to conform as nearly as is consistent with the public interest, *with those of private establishments in the immediate vicinity.*

Plaintiffs' attack is two pronged; generally, they challenge the defendants' use of the percentage differential for establishing the wage scale for Aircraft Examiners. Primarily, however, plaintiffs' claim is directed against the actual amount of the differential which they contend is too low. Defendants argue that use of the percentage differential is appropriate for determining plaintiffs' wages, that wage determination is a matter of executive discretion, and that the actual establishment of the percentage differential was based on permissible considerations and resulted in fixing lawful and appropriate wages for the plaintiffs.

This Court recently considered the propriety of the percentage differential in establishing wage scales for non-graded positions under the same statute. In *Rogers* v. *Laird*, —— F. Supp. —— (E.D. Va. No. 6440-N, September 14, 1970), we held that use of the percentage differential was reasonable and proper for setting wage scales where it involved numerous trade classifications and wage markets, covering large areas of the county, and the evidence otherwise established its use feasible. Basically, the considerations existing in *Rogers* v. *Laird* exist here.

The wages of Aircraft Examiners are based upon a percentage differential over the specific mechanics which they supervise, that is, over the machinist, electrician, electronics mechanics, etc. The wages for the mechanics are set in individual labor market areas based upon what is generally paid for the same kinds of work in private establishments in the labor market area. A labor market area is considered to be that area wherein an individual can change his place of employment without having to change his place of living.

In ascertaining the pay of the mechanics, the Navy surveyed those firms in the labor market area[1] which employed mechanics who used essentially the same skills required of mechanics employed by the Navy. In its surveys of private industry, the Navy was unable to find a position to duplicate the Navy's position of Aircraft Examiner, nor have plaintiffs shown that a duplicate position exists in private industry. Here, no complaint is made of the pay of the mechanics, but only of the Aircraft Examiners. They complain of the use of the percentage differential over the pay of the mechanics they supervise in fixing their pay, and the percentage differential used for them is too low. The issue here is not whether the Court would have granted the plaintiffs a higher percentage of differential or have used some other means to fix the wage; the issue is, whether the Navy has complied with the statute or acted arbitrarily. If the matter is one within the discretion of the Navy, the Court has no jurisdiction. Aircraft Examiners are responsible for deciding exactly what work must be done to the various systems and components of an airplane when it is brought to the facility for overhaul. Since the Examiners' position bears an obvious relationship to that

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1—There are about 150 labor market areas in the United States, and 7 major areas where Aircraft Examiners are concerned.

of the mechanics, comparing the two wage scales seems fair and appropriate. Naturally the Aircraft Examiners receive a proportional wage increase whenever the mechanics receive an increase. This occurs almost annually.

Since plaintiffs' attack is directed principally at the actual amount of the differential rather than its use, a closer examination of that claim is necessary. Specific differential determinations are based on judgments of the skills required and responsibilities inherent in the work. This is also true of all positions for which the percentage differential is used. Before 1963, the percentage differential for Aircraft Examiners and three other positions was 12%. In 1963, the differential for the Examiners and two other positions was increased to 16%, while the differential for the other position was increased to 20%. Since 1963, all the other positions have received higher differentials than the Aircraft Examiners. In 1969, the differential for Aircraft Examiners was increased to 19.2%, but plaintiffs contend that as far back as 1963, their differential should have been 25%.

There is no factual basis for plaintiffs' contention other than the recommendations of some subordinate wage specialists and auditors. None of these recommendations was approved after consideration by the proper authorities. Plaintiffs' contention is that their differential should be the same as the related position of Planner and Estimator, which is 25%. However, plaintiffs do not dispute that the Planner and Estimator position requires a higher degree of skill and responsibility. Pointing to the increased complexity and sophistication of aircraft in recent years, plaintiffs claim that these developments have increased their duties and responsibilities. Certainly this is true, but plaintiffs overlook the obvious fact that the duties and responsibilities of the aircraft mechanics,

on whose wage scale their differential is based, have increased to the same extent. Since the wage scale of the mechanics has increased annually to reflect these technological advances, and the Examiners' differential is applied to the mechanics' wages, the Examiners' pay likewise reflects these developments. That the differentials of other positions have increased more than that of Aircraft Examiners can have no bearing on the merits of plaintiffs' case since there is little correlation between positions and the others may require greater degrees of skill and responsibility.

As has been indicated, plaintiffs base their claim for increased pay on various recommendations that the differential be increased to 25%. These recommendations were made by subordinates whose investigations were rather limited and, in some cases, based solely on briefings by the Examiners themselves. Plaintiffs ignore the testimony of Phillip Meyerson, Director of the Personnel Management Division of the Office of Civilian Manpower Management, that the recommendations for and against increasing the Examiners' differential was too high. Mr. Meyerson testified that he and his staff reviewed all the information available to them in 1969, and in their unanimous judgment," they concluded that the duties and responsibilities of Aircraft Examiners did not call for an increase in their percentage differential.

Part of this controversy concerns the improvement of the Civil Service Commission, which in 1967, was assuming responsibility for setting the wages of civilians within the Department of the Navy. Because of this situation, the Navy consulted with the Commission before making any changes in its compensation arrangements. The Commission was preparing to implement its new coordinated Federal Wage System which would bring more than a dozen different wage systems from various

federal agencies into a single system under the Commission's direction. Many positions to be included in the new system, including that of Aircraft Examiner, were not graded for pay purposes and were substantially different from the pay systems used for most federal blue collar workers. The Commission had these ungraded positions "set aside" until further studies could be made to determine how to work them into the coordinated Federal Wage System. Being "set aside," however, did not mean that those positions could not receive pay increases. This is obvious, because in 1969, plaintiffs' percentage differential was increased from 16% to 19.2%. Plaintiffs attempt to put the Commission's request, that the Navy not make changes in its pay system while the new wage system was being implemented, in a nefarious light, claiming that the request was the sole reason the differential for Aircraft Examiners was not increased. The evidence, as already related, simply does not support this contention. Moreover, Mr. Meyerson testified that the decision was independent of the Commission's request not to change the pay system.

Plaintiffs have labeled the refusal to authorize the increase in differential an "arbitrary, unjustified and discriminatory denial of pay increases . . . that is required by law." The determination not to authorize an increase was an executive decision, reasonable on its face and within the bounds of the discretion prescribed by the statute. Plaintiffs have not shown that the decision was arbitrary, capricious, or unfair in any way. Under these circumstances, this Court should not interfere with the determinations made by the Executive Branch of the Government.

The statutory provisions governing wage setting for non-graded civilian employees specifically require that these pay scales be "consistent with the public interest."

This has been interpreted as a delegation to the Executive of a wide discretion in fixing the wages of its employees. See *Rogers* v. *Laird,* supra. Accordingly, judicial review of an Executive decision is properly limited to those circumstances where the Executive has exceeded its authority or its action is clearly wrong. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *United States* v. *Shimer,* 367 U.S. 374, 381 (1961). Probably most relevant in describing the Court's function under these circumstances is the Court of Claims recent statement in *Daniels* v. *United States,* 407 F.2d 1345, 1347 (Ct. Cl. 1969):

> It should be clear from the cited authorities that this court will not purport to tell the Secretary of the Navy what salary formula and base he should adopt. Our concern is simply to determine whether plaintiffs have met their heavy burden of proving that the Secretary's action in this instance was so arbitrary as to be clearly wrong.

Plaintiffs have not shown that the decision not to authorize an increase in differential was so arbitrary as to be clearly wrong. To the contrary, defendants have offered affirmative evidence that the determination was within its discretion. Congress vested authority for these decisions in the Executive, apparently because of its expertise and familiarity with the particular consideration involved. That Branch of Government is much better qualified to pass on the question of wages than the Court. Since plaintiffs have not shown that this authority was improperly exercised, their action is DISMISSED.

s/ RICHARD B. KELLAM
United States District Judge

Norfolk, Virginia
November 18th, 1970.

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1198

Perry Bradshaw, Warren D. Tucker,
and Bernard C. Kelly,

Appellants,

versus

Melvin Laird, Secretary of Defense,
William Chaffee, Secretary of the Navy,
Robert E. Hampton, Commissioner,
Civil Service Commission,
James B. Johnson, Commissioner of
Civil Service Commission, and
Nickolas J. Oganovic, Commissioner,
Civil Service Commission,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Richard B. Kellam, District Judge.

(Argued August 26, 1971
Decided September 13, 1971.)

Before HAYNSWORTH, Chief Judge, and WINTER and RUSSELL, Circuit Judges.

Stanley E. Sacks (Sacks, Sacks and Tavss on brief) for Appellants, and William D. Appler, Attorney, Department of Justice, (L. Patrick Gray, III, Assistant Attorney General, Alan S. Rosenthal, Attorney, Department of Justice, and Brian P. Gettings, United States Attorney, on brief) for Appellees.

PER CURIAM:

We affirm on the opinion of the district court. *Bradshaw* v. *Laird*, 319 F.S. 390 (E.D.Va. 1970). See also, *Rogers* v. *Laird*, 319 F.S. 1 (E.D.Va. 1970), *aff'd. per curiam*, 4 Cir., No. 15,312, May 19, 1971.

AFFIRMED.

PLAINTIFF'S EXHIBIT NO. 2

MADSEN

Code 15
12531 Crace
22 January 1963 1-22-63

From: Commanding Officer, U. S. Naval Air Station, Norfolk, Virginia

To: Chief, Bureau of Naval Weapons (DCP-2)

Subj: Pay level for Aicraft Examiners; recommendation concerning

Ref: (a) BUWEPS ltr DCP-23:DAE of 9 May 1962
(b) CO, NASNORVA ltr Code 15 12531 of 23 Aug 1962

Encl: (1) Responsibilities of an Aircraft Examiner

1. Upon receipt of reference (a) by this activity, reference (b) was prepared and submitted to the Chief, Bureau of Naval Weapons (DCP-2) recommending a 12% pay differential based on the General Wage Service pay level W-11 for Aircraft Examiner.

2. At this time, further consideration of the increased scope and responsibility of Aircraft Examiner functions necessitate re-evaluation and/or reconsideration of the original recommendation contained in reference (b).

3. In view of the increased responsibility of Aircraft Examiners, as depicted in enclosure (1), the pay level differential of 12% (WF-30) recommended in reference (b) for Aircraft Examiner is considered inadequate. The overall scope of functions related to duties performed and/or work relationships with other Groups in the Overhaul and Repair Department of this station, preclude wage allocation of these responsibilities by existing criteria. It is the Aircraft Examiner's numerous contacts with other personnel, and the purpose of these contacts, that create responsibilities that justifiably should be recognized. After discussing enclosure (1) with Aircraft Examiner representatives and realizing the Station's dependency placed upon the Aircraft Examiner in the performance of his duties, a change in recommendation of pay level differential is considered mandatory. Therefore, this Station recommends a 25% differential above the 2nd step of pay level W-11 in lieu of the previous 12% recommendation forwarded by reference (b).

4. It is also suggested that in addition to the existent pay formula WF-10, which is based on GWS pay level W-11 plus differential F, that a new wage formula be established to keep the proposed formula in line with the present grouping of Inspection Service ratings. For example, "WF-44" might be added to Table 3.2 of NCPI 531, Enclosure 1. This formula number (WF-44) might then stipulate: "Base Level" is W-11, 2nd step rate equals 2nd step rate for W-11 plus area rate for GWS differential "F"; get 1st and 3rd step rates from Table 3.5.

S. B. MULLHOLAND
By direction

THIS IS A TRUE COPY.

PLAINTIFF'S EXHIBIT NO. 3

MEMORANDUM TO FILE

Subj: Work-site audit of Aircraft Examiners at NARF Norfolk

BACKGROUND:

The National Association of Aeronautical Examiners requested an audit of their job because they believe their duties increased in scope and have added responsibilities since last upward change in differential was authorized in February 1963. The visit was made by Ed Webb (0532.2) on 13-14 of December. Charles Gard, BROCMM LB also visited North Island on these dates for the same purpose.

CONTACTS:

NAS personnel: *Mr. Gossett, Senior Classifier, and Mr. Brown IRO.*

NARF personnel: *Mr. Cahill, Supt. Production Controller, GS-14,* Mr. Percy, Supt. I, Mr. Spiers, Gen. Foreman (I), Mr. Eike, Foreman (Ldgmn)

Union Officials: Mr. Bradshaw, National President, and Mr. Kelly, President of Local

Aircraft Examiners: Messrs. Perry, Ashley, Robinson, Tucker, Hampton, Crawfor, Culp, Lancaster, Stakbach

DISCUSSION:

(1) *Mr. Gossett and Mr. Brown believe that a higher pay rate is warranted. Reiterate their position of January 1963 that because of the dependency on Examiners, 25% differentials appropriate proper.*

(2) *Mr. Cahill: as Head of the Production Planning & Control Group, he believes Examiners deserve more money.* They have the authority to determine depth of rework. He agreed that the job description attached adequately describes Examiner duties and is accurate. Employees are not involved in estimating work as found in the Planner & Estimator rating which concerns shop capacities, manpower schedules, work programs and availability of material.

(3) *Shop Supervisors: They recognize that the responsibility for depth of overhaul is vested in the Examiner. Indications are that very few differences occur and then it usually ends in favor of the Examiner.*

WORK FUNCTIONS:

The attached job description describes the overall duties of employees rated as Examiner. It is further substantiated by station directives and functional statements—*Of particular note is the independence with which these employees operate.* Rarely did a shop supervisor appear on the scene. There are 47 Examiners and 3 Supervisory Examiners. Quite often they function as a team with each man responsible for his specialty. The Leader rating is not used. In a sense, these men are trouble-shooters. They minutely examine aircraft to find out what is wrong; what should be replaced; what can be repaired and check and test equipment on plane to hold item removals to a minimum. Although they determine depth of rework, it was noted that the shop supervisor estimated the manhours for rework. *Two duties previously found in P & E seem to have been assumed by the Examiner:* (1) *he orders material needed and* (2) *on occasion he may report to crash scene to assist in determining extent of damage and disposition of aircraft.*

TYPES OF REPORTS:

1. Pre-induction. Reflects operational environment, custodian, age, flight hours, deployed area, technical directives incorporated.

2. Analytical History: date on aircraft from which item removed, flight hours, landings, etc.

3. Missing Replacement Items List: Parts no., nomenclature, material availability.

4. Discrepancies: log shop, check-off, explanation of discrepancies not corrected.

5. Request for Engineering Information: Part no., background information, recommendations, etc.

6. Accessory and component service record; Directives status, description, compliance, specifications.

MEMORANDUM TO FILE

Subj: Visit to Robins Air Force Base, Ga.

1. Work similar to that of Aircraft Examiners exists at Robins Air Force Base. While visiting on February 7-8, the following contacts were made:
Mr. R. Owens, Senior Classifier
Mr. W. Polk, Classifier
Mr. A. Crews, Head A/C Quality Branch
Mr. W. Poland, Head, E & I Unit
Mr. J. Hill, Supervisory Aircraft Inspector
Mr. M. McCauley, Aircraft Inspector Electrician
Mr. J. Daniels, Aircraft Inspector (Airframes)

2. The PAR type functions have not been developed at the base to the same degree as in Navy. No pointed instructions have been released to give depth-of-work

authority to the Examination Unit. Quality Assurance conducts a sampling review of the examiners findings and Production Planning makes the decisions concerning depth of rework. There is a separate A/F rating for employees engaged in crash damage examination. Significant observations were:

a. Employees are concerned with visual examining for obvious defects in accordance with work guides and instructions.

b. Discrepancies found are noted more for protection of examiner and are not necessarily corrected.

c. Not concerned with any examination when external power is being applied to craft, ie: landing gear, instruments, etc.

d. Not responsible for compliance with changes in technical directives or modifications.

3. *Conclusion*: *The examining function exists but is not organized as in Navy.* Ours is a better job with authorities and responsibilities being spelled out. *See A/C Examiner job description which reflects major differences.*

PLAINTIFF'S EXHIBIT NO. 4

Code UARF-100/JBS.
12510
11 March 1969

From: Commanding Officer, Naval Air Rework Facility
Naval Air Station, Norfolk, Virginia 23511

To: Naval Air Systems Command Representative, Atlantic,
Naval Air Station, Norfolk, Virginia 23511

Subj: Pay Category review of positions of Aircraft Examiners; comments concerning

Ref: (a) OCMM ltr OCMM 053:ebs of 22 Nov 1968

1. Reference (a) requested an audit of a sample of three positions, each representative of a group of positions in the Examination and Evaluation organization.

2. Three representative samples of position descriptions for Aircraft Examiner are in the process of being evaluated by the local classification office. Position audits will begin the week of 17 March 1969.

3. Preliminary evaluation of the position descriptions indicate that the positions should remain in the ungraded category. Upon completion of the audits results will be forwarded.

J. T. HAYES
By direction

PLAINTIFF'S EXHIBIT NO. 5

25/12500/109
7 MAR 1969

From: Naval Air Systems Command Representative, Atlantic

To: Commander, Naval Air Systems Command (Attn: NAIR-04)

Subj: Pay Category Review of Positions of Aircraft Examiners

Encl: (1) Copy of Office of Civilian Manpower Management's letter OCMM 053:ebs of 22 Nov 1968

1. By enclosure (1) the Commanding Officers of the Naval Air Rework Facilities were requested to submit three audited position descriptions, each representative of a group of positions in the rating of Aircraft Examiners, for appropriate review to determine whether the positions should now fall into the graded instead of the ungraded category.

2. While *some of the audits requested* from East Coast Rework Facilities by enclosure (1) *are still in process*, the Commanding Officers of the Cherry Point, Jacksonville, Norfolk, and Quonset Point rework commands *have submitted their review*, and it is their unanimous recommendation that these positions should remain ungraded.

3. The consensus of these opinions, developed independently at each Rework Facility, is best expressed in the words of one Position Classification Specialist whose audit stated *"the fact that employees in these positions must possess and use technical knowledge, which can only be acquired in the practice of the trade concerned, estsab-*

lishes trade knowledges as the paramount requirement to effectively carry out their assignments. In view of the above, the positions are clearly ungraded positions and should be rated in accordance with the Navy's guideline descriptions for ungraded positions, specifically NAVEXOS P-1005-382 Aircraft Examiners".

4. In view of the unanimity of opinions expressed to this Command, and, upon further review concurred in by this Command; it is felt that further review would be both time consuming and unproductive, and it is therefore recommended that the Naval Air Systems Command explore the necessity of further correspondence concerning this subject with the Director of Civilian Manpower Management.

5. *Audited data as received, will be retained by this Command,* and will be available for back-up information upon request.

B. K. WHITEFIELD

Copy to:

NAVAIRSYSCOMREPAC
NAVAIRSYSCOMREP PNCLA.

Received by N.A.A.E.
21 MAR 1969

PLAINTIFF'S EXHIBIT NO. 6

Code NARF-500/KF
25 June 1969

On this date, all of the Naval Air Rework Facilities were called and asked their feelings on Aircraft Examiners getting an increase in pay differential and on their going graded.

Mr. Prentice, Pensacola, said they should get an *increase in pay differential,* in fact, *he felt they should be equal to a Planner and Estimator.* He was opposed to their going graded.

Mr. Larkowich, Quonset Point, said they should get an *increase in pay differential, even the 31% they have requested.* Inspectors at his Station have gone graded so he feels that the Aircraft Examiners should also.

Mr. Haas, Jacksonville, thinks Aircraft Examiners should get an *increase in pay differential* but has no feel for exact figures. He is opposed to their going graded.

Mr. Vellines, Cherry Point, would like to see them get an *increase* which would at least raise them above their co-workers in Quality Assurance but had no exact figure in mind. He feels that they will probably go graded although he said it made no difference at Cherry Point. Regardless he thinks trade background is important.

Mr. Milne, North Island, *feels very strongly* that the Aircraft Examiners should *get an increase* and is presently rewriting their job descriptions, after which he plans to ask for an audit. Their increase should be based on the results of the audit. He is opposed to their going graded because of the trade background factor. He also stated that a series of meetings with all 500's attending such as those held during the Production Control conversion would be beneficial. In addition, he would like to see some type of formal training for Aircraft Examiners.

Mr. Maquire, Alameda, thinks Aircraft Examiners should *get an increase* if it is reasonable. He feels that an increase would create alignment problems unless the increase is given across the board. He does not want the Aircraft Examiners to be above the Planner and Estima-

tor level. Mr. Maquire is opposed to their going graded because of the trade background factor.

PLAINTIFF'S EXHIBIT NO. 7

RECAPITULATION OF CERTAIN DATA RELATIVE TO AIRCRAFT EXAMINERS

1/22/63

CO NAS NORVA ltr Code 15 12531 to BUWEPS (DCP-2) recommended a 25% differential above the 2nd step of pay level W-11 "in view of the increased responsibility of Aircraft Examiners," "the overall scope of functions related to duties performed and/or work relationships with other Groups in the Overhaul and Repair Department of this station," "the Aircraft Examiner's numerous contacts with other personnel, and the purpose of these contacts, that create responsibilities that justifiably should be recognized," and in "realizing the Station's dependency placed upon the Aircraft Examiner in the performance of his [the Commanding Officer's] duties."

4/13/67

Letter from Local #4, Association of Aircraft Examiners, NorVa, to OCMM via (1) CO NARF NORVA and (2) COMNAVAIRSYSCOM, Washington, requesting "consideration be given to an increase in the pay differential for Aircraft Examiners to rate plus 31% predicated on the Aircraft Examiner's "great impact on the production, cost and quality of the finished product," and the "departure from the standard overhaul method of reworking Naval aircraft, which at that time [September 1955 when the existing P-1005 rating definition for Aircraft Examiner was issued] was decidedly less sophisticated, complex or costly."

7/25/67

CO NARF NORVA FIRST ENDORSEMENT [Code IRC 12531] on Local #4's ltr of 4/13/67. Endorsement addressed to OCMM via COMNAVAIRSYSCOM, Washington, forwarded the basic letter and "recommended that no increase in differential for Aircraft Examiner be considered at this time pending implementation of the occupational structure" for production-control ratings since it was "fully anticipated that the results of the study will have a direct impact on other ungraded, staff ratings within the production planning and control system, such as Progressman, Planner and Estimator, and Aircraft Examiner."

9/25/67

OCMM ltr OCMM 0532.2:ebs to Local No. 4, Asso. of Aeronautical Examiners, No. Va, via CO NARF NORVA referred to the Association's ltr of 4/13/67 and stated: "... it has been determined that a change in pay or definition is not warranted.... Rating definitions are intended for use as guides in determining appropriate rating and they do not include the specificity found in individual job descriptions. It is believed the definition provides adequate coverage of the work included under the Aircraft Examiner rating. When the pay formula for Examiner was changed upward on 1 February 1963, the change reflected this Office's consideration of the impact the Aircraft Rework Program had on the work. This consideration was an important factor in setting the pay differential at its present level [WF-11—16% + 'rating concerned']."

12/13&14/67

On-site job audit by Mr. Ed Webb of OCMM of work of Aircraft Examiners. Audit initiated at request of the National Association of Aircraft Examiners. At local

levels in Norfolk there is no documentary evidence of Mr. Webb's audit findings and/or any subsequent recommendations.

11/22/68

COMM ltr COMM 053:ebs to all NARF's requesting "Pay Category review of positions of Aircraft Examiners" and a "classification evaluation."

4/18/69

CO NARF NORVA ltr Code IRC 12510 to NAVAIRSYSCOMREPLANT transmitting 3 position descriptions and an evaluation report in compliance with OCMM's ltr of 11/22/68, referred to above. The evaluation report "recommended the position in question remain in the ungraded pay category" and "recognized that the pay gap between graded and ungraded employees continues to widen and it is also recommended that serious consideration be given to study of these inequities with a view toward achieving more comparability." Paragraph 8 of the evaluation report forwarded as enclosure (4) of CO NARF NORVA ltr of 4/18/69 is repeated below for ready reference:

"8. CLASSIFICATION: As indicated in paragrph 7 above; it is considered that the positions undergoing evaluation are properly placed in the ungraded pay category. Therefore in approaching the classification evaluation of the positions, their duties and responsibilities will be compared with the Navy Department's ungraded definition for the rating of Aircraft Examiner (designate by trade), NAVEXOS P-1005-382 (9/55).

a. As indicated in the foregoing analysis contained in paragraph 6, "the paramount purpose of the positions involves the examination, analysis, and evaluation of aircraft and their related equipments in order to control

the extent of disassembly and the depth and scope of rework required to achieve material readiness of the aircraft." In order to perform those functions the incumbents analyze and evaluate equipment service records, collect and analyze data obtained during the preinduction functional operation of the aircraft and its interrelated systems, conduct an overall visual examination of the entire aircraft (hangar check), and prepare and issue detailed work instructions to the production shops by appropriate entries in the workbook. Those functions are considered to equate substantially to the coverage of the "Rating Summary" contained in the definition for Aircraft Examiner, which states: "Examines and evaluates the condition of aircraft, aircraft engines, and their components and accessories to determine the depth of overhaul required for the particular aircraft and engines. Determines general condition, prescribes extent of disassembly, and specifies any departures to be made from standard overhaul process." (Underlining has been added for emphasis.) Special significance is attached to the underlined words inasmuch as the "overhaul" concept has been replaced by the progressive aircraft rework (PAR) concept. Consequently, the "standard overhaul process" is no longer followed, and as a result many "departures" from established procedures become necessary in order to rework, primarily, only those required items to provide material readiness and insure safety-of-flight potential. To determine what work will or will not be accomplished, as pointed out in paragraph 8.e. above, the position incumbents must exercise discernment and judgment in making such appraisals which will directly affect the material readiness of the aircraft and their systems and components. In addition, changes in the complexities of aircraft, engines, components, systems are taking place at a rapid rate, and the position incumbents are re-

quired to be knowledgeable in those respects. The knowledge extends across trade lines to a considerable degree in various instances. In addition, incumbents "must have a thorough knowledge of principles used and vast practical experience in the overhaul, maintenance, modification and repair of" aircraft and their systems and components, as indicated in the position descriptions and also in the foregoing analysis. Thus it is believed that the Aircraft Examiners' level of complexity and responsibility have both increased in recent years. In that respect attention is invited to paragraph 6.c. above which indicates that the "position incumbents' knowledge of aircraft and of the systems and components peculiar to each configuration worked at Norfolk extends beyond the three basic models regularly inducted for progressive aircraft rework." As a result the position incumbents serve as a focal point within the Naval Air Rework Facility for collecting, analyzing, interpreting, and developing specialized information about the aircraft and their components and systems. In addition, they provide recommendations to program planning managers, to engineering personnel, to operations analysts, to production supervisors, to the PAR Liaison Officer, and to squadron Commanding Officers relative to a variety of considerations contributing to the ultimate material readiness of aircraft." It thus becomes apparent that the Aircraft Examiners' efforts have considerable impact on the overall effectiveness of the Naval Air Rework Facility to accomplish its primary mission, which is "to maintain and operate facilities for and perform a complete range of depot level report operations on designated weapons systems, accessories, and equipment; manufacture parts and assemblies as required; provide engineering services in the development of changes of hardware design; furnish technical services on aircraft maintenance and logistic problems; and perform, upon specific request or assignment, other levels of aircraft maintenance."

6/24/69

Writer's Comments: Comparison of the immediately above-quoted evaluative considerations of April 1969 with those contained in CO NAS-NORVA ltr of 1/22/63 will indicate essentially similar appraisals which have been made by different position classifiers on separate occasions. It is the writer's personal opinion that the continuously increasing complexities of naval aircraft, their components, and of their various interrelated systems are adding to the Aircraft Examiners' level of difficulty and that the reliance placed upon them by management as a coordinating and focal point for insuring aircraft material readiness and safety-of-flight capability is consistently adding to the Aircraft Examiners' levels of responsibility.

Developed by and
respectfully submitted
on 24 June 1969—

s/(Mrs.) Vida H. Meacham
Position Classifier

LETTER FROM CAPTAIN W. D. FARNSWORTH TO NAVAL AIR SYSTEMS COMMAND

PLAINTIFFF'S EXHIBIT NO. 11

Code IRC
12550
9 JUN 1969

From: Commanding Officer, Naval Air Rework Facility, Naval Air Station, Norfolk, Virginia 23511

To: Naval Air Systems Command Code O4A4, Washington, D. C. 20360

Via: Naval Air Systems Command Representative, Atlantic, Naval Air Station, Norfolk, Virginia 23511

Subj: Pay adjustment for Aircraft Examiners; information concerning

Encl: (1) Position description typical of Aircraft Examiners
(2) Evaluation report of Aircraft Examiner positions

1. This Facility has recently received an *additional* request from the National Association of Aircraft Examiners, Local No. 4, seeking to update NAVEXOS P-1005-382. The purpose behind the request is for an increase in the pay differential for Aircraft Examiner. A similar request was denied by the Director of Civilian Manpower Management in September 1967.

2. Enclosures (1) and (2) were submitted in response to a letter dated 22 November 1968 from the Office of

Civilian Manpower Management regarding a pay category review for Aircraft Examiner positions. The recommendation contained in enclosure (2) was that the positions should remain in the ungraded pay category. However, the Aircraft Examiners are not receiving pay commensurate with their responsibilities as defined in enclosures (1) and (2).

3. It has been in excess of two years since the initial request for an increase, and information on record indicates that no action will be taken until the implementation of the Coordinated Federal Wage System which is scheduled for this area in July of 1970.

4. The problem is further aggravated by the proposed interim adjustment as per OCMMNOTE 12531 OCMM 0333 1:ejs of 4 April 1969 which will result in further misalignment between Aircraft Examiners and the closely related positions of Planner and Estimaters.

5. It is strongly recommended that the differential be increased prior to implementation of the Coordinated Federal Wage System, even prior to the final decision on whether or not the enclosure (1) positions should remain in the ungraded category.

W. D. FARNSWORTH

Blind copy to:

National Association of Aeronautical
Examiners, Local No. 4 (w/o encl)

EXCERPTS FROM THE TESTIMONY OF WILLIAM N. PRICE

* * *

(Tr. p. 118)

Q. Now, when that audit was completed, did you have further duties and responsibilities concerning the request for an increase in the differential?

A. Yes. It was then my responsibility to examine Mr. Webb's findings and those of our other auditor on the West Coast and come up with a final recommendation as to whether the differential should be changed or not.

* * *

(Tr. p. 119)

Did your office, representing the Navy Department, come to a conclusion as to whether or not, bearing in mind the appropriate criteria, the differential at that time should be increased?

A. There was considerable discussion. The tentative conclusions that I came to personally related to relations within the Navy Department. Nothing was put in writing about these, and following a discussion with the Office of the Secretary of Defense and the Civil

(Tr. p. 120)

Service Commission I had a letter prepared for Mr. Robert Willey's signature, which left things the way it was.

* * *

(Tr. p. 123)

Q. What was his position at that time or did he have duties with reference to the subject matter we are talking about?

* * *

EXCERPTS FROM THE TESTIMONY OF GORDON N. KELLETT

(Tr. p. 193)

Q. And what did you tell him?

A. And I restated the original position of the Civil Service Commission, that the Aircraft Examiners, amongst a number of other occupations that the Navy had paid a pay differential, were set aside for further study and they would not be included when we converted the other General Wage Board employees to the Coordinated Federal Wage System beginning in July of 1968.

* * *

(Tr. p. 198)

Q. Well, jumping from the complaint for a moment did Mr. William Price tell you the Navy wanted to give them an increase and ask you—other than the interim increase, now, before you get to the interim increase, did Mr. Price tell you that they wanted to raise the 16 percent differential and ask you—could they do it and you, for Civil Service, said, "No; we don't want you to do it because we don't want anybody to change until we get this new system implemented"?

A. Mr. Price, if I recall, asked if they would propose, make a particular change, would we object.

Q. And what did you tell him?

A. I said, "Yes; we would object,"—

Q. All right.

A. —if they proposed a change.

Q. All right.

Now, I want to ask you this, Mr. Kellett: The

Civil Service Commission's position not to raise anything or if the Navy proposed it—was that based on an audit of the duties and responsibilities of these men or was that a blanket objection to changing anything until the new system came in?

A. The later, sir.

Q. A blanket objection?

A. Yes, sir.

(Tr. p. 199)

Q. All right, sir.

You all made no audit to determine whether or not the duties and responsibilities justified an increase; it was your position that you didn't want to rock the boat?

A. Correct, sir.

* * *

(Tr. p. 201)

Q. And in the meantime it's the Commission's continuing position that the Aircraft Examiners not be raised, if the Navy should propose to do that, until at least the new

(Tr. p. 202)

system comes into effect?

A. No, sir, because we have already begun to study—we are studying—the Aircraft Examiners as well as Inspectors, Production Planners, those that are set aside.

We have a two-phase study under way, one which will cover practices, survey practices, in industry to find out how they treat these particular occupations both from a job evaluation and a pay system operation,

and at the same time I have occupational specialists that work for me that are reviewing the federal jobs, Aircraft Examiners—

As a mater of fact, in the last few weeks one of my occupational specialists had surveyed, interviewed, people on the job at Norfolk, and they interviewed others,—

Q. Well—.

A. —and we anticipate when we have the other jobs as well as the pay practices we will resolve this particular issue that will decide how they'll come under the Coordinated Federal Wage System, and our target for that has been established as January 1971.

* * *

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No. 71-763

In the Supreme Court of the United States

OCTOBER TERM, 1971

PERRY BRADSHAW, ET AL., PETITIONERS

v.

MELVIN LAIRD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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PERRY BRADSHAW, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioners are aircraft examiners employed at the Norfolk Naval Shipyard. They instituted this class action contending that the use by the Secretary of the Navy of a "percentage differential" system in calculating their wages was improper under 5 U.S.C. 5341 and that, even applying that system, the evidence before the Secretary warranted an increase in the differential. Petitioners contend that they have been denied proper wages since 1963. The district court upheld the validity of the percentage differential system and found that there was no factual basis for petitioners' contention that the differential should be increased (Pet. App. 1a–7a; 319 F. Supp. 390). Rely-

455-399—72

ing on the opinion of the district court, the court of appeals affirmed *per curiam* (Pet. App. 8a-9a).

The background and operation of the percentage differential pay system, which is used throughout the executive branch for paying blue-collar supervisors like petitioners, are set forth in respondents' brief in opposition in *Rogers* v. *Laird,* O.T. 1971, No. 71-242, certiorari denied, October 26, 1971. Under this system, the Navy calculates the prevailing wage in each geographical area for blue-collar journeymen, and pays the supervisor a fixed percentage above that wage. Such a system is widely used in private industry. Its use by the government is necessitated, in part, by the fact that blue-collar supervisory positions in private industry frequently do not correspond to those in the government. The percentage differential is also used to compute the pay of aircraft examiners and other positions which are known as "production facilitating" trades. These positions fall between the mechanic and supervisory level (Tr. 132, 144).[1] The aircraft examiner is paid a fixed percentage above the wage of the mechanics whom he supervises. The differential is used because there is no counterpart to aircraft examiner in private industry (Pet. App. 3a).

The differential level is reviewed periodically and in 1963 the differential was increased from 12 to 16 percent to reflect the increasing complexity of the aircraft examiner's work (Pet. App. 4a, 20a). In addition, aircraft examiners receive salary increases whenever the

[1] "Tr." references are to the transcript of testimony in the district court. "App." references are to the joint appendix filed in the court of appeals.

mechanics' pay is increased; this has occurred annually since 1947 (App. a45).

The Secretary reviewed the differential in 1967, and concluded that an increase was not warranted (Pet. App. 20a). Late in 1967, the Navy conducted audits at the Norfolk Naval Shipyard and at the North Island, California Shipyard. The Norfolk audit recommended that no change be made in the differential rate and the North Island audit concluded that the existing differential "was too high" (Tr. 153, 161). The Navy concluded that the differential should not be increased (Tr. 126).

In 1968, the Civil Service Commission was given the responsibility for establishing blue-collar wages for all government employees under 5 U.S.C. 5341 (Tr. 141–142).[2] The Commission authorized the Navy to restudy the examiner position and, following a full review of all the evidence, the Navy concluded that "the duties and responsibilities of Aircraft Examiners did not call for an increase in their percentage differential" (Pet. App. 5a). Thereafter in 1969, following an increase granted for supervisory positions, the Commission increased the aircraft examiner's differential to 19.2 percent (Pet. App. 4a).

2. The issue whether the use of a percentage differential is a permissible exercise of the Secretary's

[2] The Coordinated Federal Wage System, as originally designed, recognized only supervisory or nonsupervisory positions in its salary schedules (App. a44). Along with certain other jobs, aircraft examiners fit in neither category (Tr. 143). Accordingly, these jobs were "set aside" pending implementation of the System, when the Commission would study the jobs to determine "whether we have to adjust the existing schedules or whether we have to introduce new schedules" (App. a44).

discretion under 5 U.S.C. 5341 was determined in favor of the Secretary in *Rogers* v. *Laird*, 319 F. Supp. 1 (E.D. Va.), affirmed *per curiam*, C.A. 4, No. 15,312, May 19, 1971, certiorari denied, October 26, 1971 (No. 71-242). There is nothing unique in the present case which warrants any different result.[3]

The remaining issue is a factual one—whether the evidence presented to the Secretary was such that he acted arbitrarily in failing to increase further the wages paid petitioners and the class they represent. After a careful review of the relevant information, he concluded that petitioners' duties and responsibilities did not warrant an increase. The district court, in a holding concurred by the court of appeals, concluded that the evidence did not support petitioners' contention that they were entitled to an increase. These factual findings were correct and further review is not warranted.[4]

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[3] As we have noted, the district court expressly found—and petitioners do not contend to the contrary (Pet. 14)—that positions comparable to that of aircraft examiner do not exist in private industry (Pet. App. 3a). Thus, use of a direct comparison method for computing wages, rather than a percentage differential, would be impossible.

[4] Petitioners' contention that every audit conducted by the Navy established a need for higher wages (Pet. 4) overlooks the fact that both the 1967 audits recommended against an increase. It also fails to take account of the testimony of Phillip Meyerson, Director of the Personnel Management Division of the Office of Civilian Manpower Management, that the Navy reviewed all the recommendations and concluded that an increase could not be justified (Pet. 5a-6a). The district court properly characterized the recommendations on which petitioners rely as having been "made by subordinates whose investigations were rather limited and, in some cases, based solely on briefings by the Examiners themselves" (Pet. App. 5a).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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